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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 660

JAMES FRANKHOUSER,
Petitioner,

vs.

PATRICIA L. KISSINGER,
Administratrix of the Estate of Lee N. Kissinger, deceased, and H. M. Stern, Ancillary Administrator,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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James Frankhouser, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause.

OPINIONS BELOW

The opinion of the District Court (R. 1) is reported at 194 F. Supp. 276. * The opinion of the Court of Appeals is reported at 308 F. 2d 348 and it adopts the opinion

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* (note 1) Inasmuch as nine additional copies of the record as printed for the Court of Appeals have been filed, pursuant to Rule 21 (4), the opinion of the District Court is not appended to the petition. Rule 23 (1) (i).

rendered the same day in Thomas v. Hogan, 308 F. 2d 355. These opinions are printed as appendices A & B respectively.

JURISDICTION

Judgment was entered by the Court of Appeals on September 12, 1962.

Jurisdiction to issue this writ is conferred on this Court by Title 28, United States Code Annotated, §1254.

QUESTIONS PRESENTED

1. Is that portion of a hospital record which contains an entry showing the results of a blood analysis conducted for the purpose of determining the alcoholic content of the blood (Bogen's Test) admissible as a business record under the Federal Shop-book Rule? (28 U.S.C.A. §1732).

2. Was the conditional diagnosis of the hospital's admitting doctor to the effect that the defendant was suffering from "simple drunkeness" properly admissible under the Shop-book Rule?

3. Has the Court below, in allowing the jury to decide whether the defendant was guilty of gross negligence which proximately caused the plaintiff's death, decided a question of State law in conflict with applicable State law?

STATUTES INVOLVED

1. Va. Guest Statute. Title 8, §646.1, 1950 Code of Virginia.

> "Liability for death or injury to guest in motor motor vehicle. No person transported by the owner

or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." (1938, p. 417; Michie Code 1942, § 2154 (232).

2. The Federal Business Records Act, or shop-book rule, 28 U.S.C.A. §1732, provides:

"In any court of the United States and in any Court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section includes business, profession, occupation, and calling of every kind".

STATEMENT OF THE CASE

Federal jurisdiction rests on the fact that the case is a controversy between citizens of different states involving more than $10,000.00.

No evidence was offered as to how this accident occurred. A car, owned by the defendant, was found turned upside down on a roadway outside of the Oceana Naval Air Station. The defendant and the plaintiff's decedent, Mr. Kissinger, were lying in the roadway near the car. Physical facts introduced into evidence tended to indicate that the defendant, in negotiating a sweeping left hand curve, allowed the right wheels of his car to ride over on the right hand shoulder, and in attempting to get back on the roadway from the right shoulder, the car tire caught on the elevated edge of the roadway which made it roll over for approximately 110 feet before stopping with it's wheels in the air. Plaintiff asserts that from this evidence a conclusion can be drawn that the defendant was driving at an excessive rate of speed, and that when one couples this evidence with the additional evidence of intoxication on the part of the defendant, he has established the necessary gross negligence, as required by the Code of Virginia, Section 8-646.1, (1950), to allow a recovery, and that, further, such evidence is sufficient to allow a jury to draw the conclusion that the intoxication and excess speed were proximate causes of the accident.

Plaintiff offered to prove the intoxication of the defendant through testimony from Dr. Meyerson who was on duty at the Naval Dispensary in Oceana, Virginia, near the locale of the accident. Dr. Meyerson testified that the defendant had the odor of alcohol on his breath, and that he, the doctor, suspected that the defendant was intoxicated. (R. 182). Of course, the records, and his testimony, showed a severe laceration of the scalp and

forehead of the defendant, a broken pubic bone, and other injuries in existence at the time of his examination. The police officer also saw the defendant in the same dispensary at the same time with Dr. Meyerson, and he, too, testified to the odor of alcohol on defendant's breath. Defendant admitted that he had had six to eight beers earlier in the evening, starting at about 6:00 P.M., at which time he was with Mr. Kissinger and Mr. Kissinger was drinking with him, beer for beer. (R. 144). Mr. Frankhouser's memory blotted out around 8:00 P. M. in the evening and he did not remember driving from Norfolk to Oceana, a distance of approximately 20 miles. (R. 119).

The principal evidence of the defendant's intoxication, which is the evidence admitted under the federal shop-book rule, developed as follows:

By introducing the Navy Hospital Record through Dr. Fisher, there was further evidence from a progress note written by one Dr. Cercio, who was not present at the trial, to the effect that Frankhouser had "the odor of alcohol on his breath" (R. 97), and further, an entry made in the record by Dr. James Marlowe, who was not present at the trial, indicated that he found Frankhouser "with alcohol odor to breath" (R. 95), and that his initial impression in terms of immediate diagnosis was among other things, "simple drunkeness." It was pointed out to the jury that a Bogen's test was run and an entry by Dr. Marlowe indicated that the results showed a reading of 2.5 (R. 96). There was no testimony at the trial as to who interpreted the test.

Mr. Gibson, a hospital corpsman, testified that he drew the blood, performed the test in anywhere from 10 to 20 minutes (R. 110), and took it back to the doctor for interpretation, but he did not know to which doctor he re-

turned it. (R. 110). He withdrew the blood and put it in a test tube that had been filed with Oxilate by "the company that puts up the test tubes" (R. 108), took the tube back to his building where he added certain things to it (R. 110), and returned it to an unknown doctor.

Dr. Morano, a Toxicologist, admittedly an expert in the field of handling Bogen's testing, testified for the plaintiff to the effect that a reading of 2.5 is a marked degree of intoxication, that there is no question that the person could not possibly operate a motor vehicle, and further, that at the point, going from zero upwards, of 1.5 there is no question that everyone is under the influence (R. 112-114).

After overruling defendant's motion for judgment, n.o.v., the Court heard further evidence, out of the presence of the jury, for the Trial Judge was uncertain as to whether or not the entry showing the results of the Bogen's test was properly admitted and the Trial Judge wanted to determine in his mind whether or not one needed to be an expert in the field to properly handle and interpret a Bogen's test (R. 149). To clarify this for the Trial Court, the defendant called Dr. Morano, out of the presence of the jury, who testified with reference to the method of performing the test. He testified that the interpretation depends to some extent on the person reading the test, (R. 153) and that though he had performed 15,000 such tests, he, himself, would likely be inaccurate to the extent of .01 (R. 153) (by Navy standard .1), but on a reading of 2.5, such a variation as he would be subject to himself, would have no practical significance (R. 162). He testified that performing and interpreting a Bogen's test was not within the realm of the normal medical doctors knowledge (R. 154), that there are special schools conducted with reference to administering a Bogen's test,

that some medical schools expose their students to the fact that there is such a test and to it's significance but that these medical schools turn out doctors who are "not trained to do the test" (R. 155-156). In answer to the Court's questions he said that he did not "think the ordinary surgeon, unless he were exposed to this test would know how to approach it or how to evaluate the test" (R. 159). One who has performed only a few of the tests was, in his opinion, not as competent to handle and interpret the tests as one who has conducted many of them (R. 161). With reference to the conduct of the test, one must boil the blood for one-half hour (R. 152).

Pursuant to the same inquiry by the Court, the plaintiff recalled the witness Gibson, out of the presence of the jury, on May 3, 1961, over three months after the trial of the case. At this time a pink slip was called to the Court's attention, which was part of the hospital record, and which had not been explained to the jury or referred to at the trial (R. 3). Mr. Gibson testified that on this slip one Dr. Heldt had made an entry showing the results of the Bogen's test to be 2.5 (R. 167) and that Dr. Heldt had made the interpretation (R. 168). At this time he reversed himself and said that he now remembered that it was Dr. Heldt to whom he had returned the test (R. 169), and he further said that Dr. Heldt frequently evaluated such tests (R. 168). He did not remember Dr. Marlowe, whose notes had been used at the trial, being present that evening (R. 170). He was not even able to look at the record and tell whether Dr. Marlowe was there that evening (R. 174). He testified that Dr. Heldt was a Lieutenant about 28 years old (R. 175) whereas testimony at the trial from Dr. Fisher developed that Dr. Marlowe was an interne (R. 102).

Mr. Gibson testified that he had a high school educa-

tion plus three months basic hospital corps school, and he had been a 3rd class hospital corpsman for five years doing laboratory work for three years (R. 178). He did not shed any light at all on Dr. Heldt's ability to perform a Bogen's test.

At the conclusion of the plaintiff's case, motion was made by the defendant to direct a verdict in his favor on the grounds that the evidence was not sufficient to show that he was guilty of gross negligence which was a proximate cause of the accident, (R. 131-132) and this motion was renewed at the end of the evidence (R. 145). This motion was further renewed by moving the Court for a judgment in favor of the defendant, n.o.v., following the return of the jury's verdict (R. 147).

After both plaintiff and defendant had rested, defendant moved the Court to direct a verdict for the defendant on the grounds that the plaintiff was guilty of contributory negligence, in assuming the risk, as a matter of law (R. 145) and this motion was renewed after the jury's verdict, at which time defendant asked for judgment n.o.v. on the same grounds (R. 147).

Objection was made to introduction of the results of the Bogen's test in proceedings before the Court prior to beginning the trial (R. 12-13), and this objection was renewed at the time the evidence was offered (R. 87 and 88 and 94). Upon the return of the jury's verdict, the defendant promptly moved the Court for a new trial based on the error committed in admitting this evidence (R. 148).

With regard to the further proceedings before the Court on May 3, 1961, at which time additional evidence was heard from the witness Kent Gibson, the defendant

objected to those proceedings prior to the questions on the grounds that they were irrevelant to the question then pending in the Trial Court's mind with regard to the admissibility of the Bogen's Test and on the further grounds that the witness had testified at the trial at which time the plaintiff was required to fully examine the witness (R. 163).

The jury returned a verdict for the plaintiff in the amount of $18,900.00, on which the Trial Court, after hearing additional evidence with regard to the Bogen's Test, entered judgment.

On appeal, the case was argued to the Fourth Circuit Court of Appeals, and a reargument was requested before the Court en banc, at which time this case was argued along with the case of Thomas v. Hogan, 308 F. 2d 355. After the reargument, the Fourth Circuit Court of Appeals affirmed the judgment of the Trial Court, with Judges Bryan and Borman dissenting for the reasons stated in Judge Bryan's written opinion. From this action, the defendant seeks a writ of certiorari.

ARGUMENT

A writ of certiorari should issue for the following reasons:

1. The holding of the Court below conflicts with the last, and only, pronouncement of this Court on the proper interpretation to be given the federal shop-book rule, as this Court decided and explained the issue in *Palmer* v. *Hoffman,* 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

2. Decisions of the Federal Circuit Courts of Appeal on the admissibility of medical opinion under the federal shop-book rule are in conflict, and these decisions should

be resolved by the Supreme Court of the United States.

3. The ruling of the lower court upon a question of local law (the evidence necessary to show proximate cause in a gross negligence case) is plainly in error.

(1) We first assert that the lower court is in conflict with this Court's decision in *Palmer* v. *Hoffman,* Supra. Since *Palmer* v. *Hoffman* is the only case decided by the Supreme Court of the United States involving an interpretation of the shop-book rule, it is quite natural that one turns to it. It reviews, as the lower court's majority opinion fails to do, the history of the shop-book rule setting forth excerpts from the report of the Senate Committee on the judiciary in footnote 3 found on Page 112 of 318 U. S. There we find this terminology,

> "The old common law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when the entries are made by machine. In a recent criminal case, the Government was prevented from making out a prima facie case by ruling that entries in the books of a bank, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the entry could identify it. Since the bank employed eighteen bookkeepers, and the entries were made by bookkeeping machines, this was impossible." S. Rep. #1965, 74th Congress, 2nd Session, PP. 1-2.

As indicated in the above quote, the shop-book rule was intended to eliminate the necessity of *"every book entry"* being *"identified by the person making it"*.

As said in Baron and Holtzhoff, Section 971, Volume 2, page 699,

"The Federal Shop-Book Rule does not render admissible any evidence that was not previously admissible. It's only effect is to eliminate the necessity of producing the person who made the record, in order to make it admissible."

The point is that the statute was designed to eliminate the situation where a witness had to come to Court merely to take the stand and point to an entry in a book and say "I made that entry". It was not necessary that he have any independent recollection of the event, that he have any particular qualifications, or that he knew anything about the truth of the matter written down. All that was necessary was that he be in a position to testify that he did in fact make the entry. Since under the expanding national concept of business, this was becoming wholly impractical, the shop-book rule was passed, and has been adopted in many states. In the case at bar, if the medical expert himself had been in Court in order to testify that he had made the entry in the hospital record, this would not have been sufficient to make the evidence admissible. The expert would have to qualify, he would have to have an independent recollection of the conduct of the test, and he would have to be prepared to explain the method used in conducting the test, subject to cross-examination on its accuracy and his ability to successfully and properly perform it. Then, and only then, would such a test, or diagnosis, become admissible.

As Judge Bryan says in his dissenting opinion, "an expert ascertainment is not 'any act, transaction, occurrence, or event' as the statute contemplates." (App. A11). Stated another way in *Palmer* v. *Hoffman,* when referring to a statement by an engineer, this Court said "It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect the transactions with others, or to provide internal controls.".

In the case at bar the lower court said "for reasons stated in *Thomas* v. *Hogan*, Supra, we think that the hospital record was properly admitted. The defendant's evidence fell short of showing that the Bogen's Test was not properly done. . . . Dr. Heldt, who evaluated the test, was not present to testify and his competency was not challenged." (App. A3). The Court first seemed to feel that it was up to the defendant to prove incompetency on the part of the plaintiff's witnesses who were testifying through a written notation in a record, rather than placing the burden on the plaintiff to show that the blood analysis was conducted properly, by competent individuals, and by a doctor who could withstand cross-examination. Dr. Heldt's competency was never shown.

What is even more important, the lower court stated:

> "the test was performed in the regular course of the hospital's business and recorded according to the regular routine of the institution, thus meeting the requirements of the Shop-Book Statute." (App. A3).

This reasoning is all through its opinion in Thomas v. Hogan, 308 F 2d 355.

> "The Bogen's Test is a relatively simple scientific procedure, commonly performed in the Navy Dispensary, which involves the absorption of alcohol from a blood sample into a chemical solution which causes it to change color." (App. B2).
>
> "to the extent that a record describes a usual routine operation of a business, it is considered trustworthy". (App. B5).
>
> "we read the statute as supplying a presumption that diagnosis and scientific tests are properly made by qualified personnel, if the recorded information reflects usual routine of the hospital and if it is the practice to record such data contemporaneously or within a reasonable time . . . When the two statutory

requirements have been met, it makes no difference whether the record reflects an expression of medical opinion or an observation of objective fact." (App. B8-9).

In direct conflict, this Court in *Palmer* v. *Hoffman* warned that such a situation might take place and indicated that it should not. On page 114 of it's opinion, this Court said:

> "regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake and Delaware Canal Company* v. *United States*, 250 U. S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the act of their historic meaning. If the act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress, not this Court, must extend it."

This Court went on to say that such a major change which opens wide the door to avoidance of cross-examination should not be left to implications. As opposed to this, the lower court has said "little need be said of the second consideration advanced by the plaintiff, that he would lose the right of cross-examination." This latter quote is from the case of *Thomas* v. *Hogan*, on which the Court rested it's conclusions. (App. B9).

It is the defendant's position that a diagnosis, or the results of a scientific blood analysis, even though done frequently, and though each step of the way is recorded, is not admissible. To hold that it is, is falling into the trap pointed out by this Court in *Palmer* v. *Hoffman*. Instead of looking to such an act, transaction, occurrence, or event as was contemplated by the act, the Court is looking only to the frequency of the performance of the test

and it's immediate recordation. Apparently frequency in recording supplies, trustworthiness, and eliminates the right of cross-examination under this reasoning.

To follow the lower court's reasoning, is only to send the public scurrying for their note pads in order to later make a civil recovery, or convict a defendant in a criminal case.

2. Let us first make it clear that the defendant does not maintain that no hospital record is admissible in evidence. We insist that any portion of the hospital record which contains a diagnosis, or the results of analysis that would normally be admissible into evidence only through the mouth of the expert, or medical doctor, is not admissible under the shop-book rule. Hence, such cases as *Wheeler* v. *United States,* 211 F 2d 19, (D.C. Cir. 1953), noted by the lower court, are not at issue. In that case, the question before the Court was whether or not a slide containing a smear was admissible under the shop-book rule. The prosecution had the bacteriologist present to testify as well as a doctor present to testify, and through the mouths of the witnesses offered evidence as to the conclusions that could be drawn from the slide. All that was necessary, before the shop-book rule, to have the slide itself admissible, was to have the person in Court who took the slide. That person would have been called as a witness merely to say that this was a slide that he in fact took. He would then say that he was in charge of the records and that this was in his records. He would not have to have any independent knowledge of having taken this particular slide from any particular individual. Also, he would not be called upon to testify as to any conclusions to be drawn from that slide. This type of evidence is clearly admissible under the shop-book rule. To bring it to the case in point, if the plaintiff was offering a sample of the

defendant's blood into evidence and could show that this blood had been withdrawn in the normal course of the hospital's business, and was kept as part of their records, then there would be no objection to the admission of that blood into evidence. What we are objecting to is to the admissibility of any expert conclusions drawn from an examination of that blood without the expert being present.

As Judge Soboloff indicates in the majority opinion in the *Thomas* v. *Hogan* case, the authorities are divided. The United States Court of Appeals for the District of Columbia, decided the case of *New York Life Insurance Company* v. *Taylor*, 147 F 2d 297 (1944) where a psychiatric diagnosis was held to be not admissible under the shop-book rule. The Court, after rehearing, wrote a lengthy opinion discussing all of the possibilities and probabilities, and ended up by saying:

> "purely clerical entries come within the rule regardless of the fact that the party making them has an interest in what they may be used to prove. Conversly where the accuracy of the entry depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant, the entries are not within the rule regardless of motive.
>
> "The reasons for the Shop-Book Rule are well stated by Wigmore to be (1) that the influence of habit may be relied on, by a very inertia to prevent casual inaccuracies; (2) that errors or misstatements in a regular course of business transactions are easily detected and misstatements cannot safely be made if at all except by a systematic and comprehensive plan of falsification; (3) that since the entrant is under a duty to employer or other superior, there is a risk of censure or disgrace from the superior in the case of inaccuracy."

There is nothing about the test partly performed by a pharmacist mate and partly performed by a doctor that brings it within any of the three reasons set forth by Professor Wigmore. As testified to by Mr. Morano in detail, there is nothing clerical about the performance of a Bogen's Test, and there is no way of checking on the results other than to conduct more tests on the same blood, and there is no indication that the doctor's superior would ever have occasion to censure him for an improper test for there is no way for him to find out that the test was improper. The Court went on to say:

> "The test should be whether they are records of a readily observable condition of the patient or of his treatment. There is no magic in the word diagnosis which makes everything which can be included in that term admissible. Some diagnoses are a matter of observation, others are a matter of judgment, still others a matter of pure conjecture. The admissibility of records of such diagnoses must depend upon their character."

This same Court, in 1956, decided the case of *Washington Coca-Cola Bottling Works, Incorporated;* v. *Tawney,* 233 F 2d 353, and allowed into evidence under the shop-book rule entries made by a doctor which "included statements as to the presence of fragmented glass and fissures discovered during rectal examinations of appellee." This case fell within the readily observable fact situation.

The United States Court of Appeals for the District of Columbia reaffirmed its position in *Lyles* v. *The United States,* 254 F 2d 725, when it again kept out the written record of an expert medical opinion as to a psychiatric disorder. The Court said:

> "essentially this Court's holding turned on the fact that an expert psychiatric opinion is not an 'act, trans-

action, occurrence, or event.' Unlike observations of physical facts, e.g. temperature, pulse rate, age, weight, et cetera, recorded in normal course, it does not meet the test of reasonable, 'reliability' which led to enactment of statutory exceptions to the heresay evidence rule."

The Court went on to say:

> "a fact can be testified to by any witness, but, with a few exceptions, an opinion can be given in evidence only by an expert, and the qualifications as an expert and reasons for his opinion are part of the premise for allowing him to testify. The shop-book act deals essentially with facts."

In 1954 the United States Court of Appeals for the Sixth Circuit decided the case of *Baltimore and O. R. Company* v. *O'Neill,* 211 F. 2d 190, in which they held that the trial judge had erroneously allowed the plaintiff's doctor to read reports to the jury that had been prepared by two other doctors at the witness' request. The witness had requested these other doctors to make X-ray films of the injury, and the X-raying doctors had submitted written reports which "contained their conclusions about what the films showed".

The defendant concedes that there are opinions to the contrary such as in *Korte* v. *New York,* 191 F. 2d 86. There, doctor's correspondence back and forth was admitted in evidence. Later, in the case of *Chapman* v. *United States,* 194 F. 2d 974, the Fifth Circuit, in refusing to admit an Army Air Force's report into evidence, said:

> "in complete agreement with the view of the District Judge, that the report was inadmissible under *Palmer* v. *Hoffman,* 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, we are of the further opinion that the

decisions from the Second and Third Circuits, cited and relied on by appellent, seemed, in the language of our brother Chase, dissenting in *Korte* v. *New York, N. H. and H. R. Company,* 2 Cir. 191 F 2d 86, 92, the last but not the least of the line, 'to be a rather complete disregard of what was decided in *Palmer* v. *Hoffman*'."

It is this strong feeling of conflict that exists between such a Court as the Second Circuit and the Fifth Circuit that recommends the issuance of a writ of certiorari by this Court.

As indicated in footnote 7 of the lower court's opinion in the Thomas case, (App. B6), there are many, many state decisions under similar shop-book rules, denying the admissibility of opinion evidence, and specifically blood tests. In the Fifth Circuit, we find the case of *England* v. *United States,* 174 F. 2d 466. There, as here, were offered into evidence Navy records. These records were rejected and the Court said:

"We have been referred to no statute or regulation of the Navy requiring these records to be made. The Navy Hospitals may be said to be conducting a business within the meaning of Section 1732, so that the routine record of what is done with or to or for a patient is admissible. But some of the documents are England's account of his past life and are clear heresay. Others are opinions of individual physicians, based on his past history on his repeated absenses without leave, resulting in his being tried four times by Courts-martial, and of their own experience with him, the conclusion being that he suffered from 'mental deficiency, (organic brain disease).' These we think are not contemporaneous records of events but are expert opinions based in part on heresay, with no opportunity for cross-examination. To be evidence in a criminal case, the witness ought to be produced to tell the facts he knows and then to get his opinion

on them and what has been proved additionally. If the United States were offering this record against England to convict him, plainly this ought to be required; and so it ought when England offers it."

3. Directing our attention to the question of whether the evidence here was sufficient to allow the jury to find that the defendant was guilty of gross negligence which was the proximate cause of the accident.

> "If reasonable men may differ as to the conclusion of fact to be drawn from the evidence, a jury question is present; but if reasonable men may not differ as to the conclusion of fact, the question of gross negligence becomes a question of law for the Court, notwithstanding a jury verdict." *Dishman* v. *Pitts,* 202 Va. 548, 118 S.E. 2d 509.

The evidence most favorable to the plaintiff shows that the defendant had been drinking with the plaintiff and became intoxicated, that presumably, as the car proceeded around a wide left hand curve, the right wheels went off on the shoulder, that this road had recently been resurfaced making the shoulder two to four inches lower than the road so that the driver in attempting to get back on the road apparently had the wheels caught on the shoulder causing his small foreign car to turn over. The distance from where the car first went onto the shoulder to the point where it ultimately came to rest was approximately 164 feet. This is the entire case on which the plaintiff rests.

In Virginia a plaintiff must show gross negligence to recover for injuries caused by his host driver, 1950 Code of Virginia, Article 8, Section 646.1. It is, of course, well settled that the substantive law of Virginia governs this case. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817.

The case of *Boggs* v. *Plybon,* 157 Va. 30, 160 SE 77, is remarkably similar:

> "at the point of this accident this road ran on a curve to the left whose radius was 900 feet and slightly downgrade. The car in question was probably on its right hand side, as it afterwards developed, it was too near the edge of the macadam over which it ran. When its right wheel struck the soft wet earth of the shoulder the defendant attempted to cut back on the road, but due, in all human probability, to surface conditions, he was unable to do this, lost control and suffered the accident which is the subject of inquiry here. . . . If there was evidence in the record upon which the jury might with propriety have found for the plaintiff, then that evidence is sufficient to establish error . . . he did keep to the right and by chance a trifle too far to the right, so that his right wheel ran from the hard surface into the soft shoulder. If there was negligence at all, this was it. It is not claimed that he failed in any duty afterwards. It is not per se negligence for the outside wheel of any automobile, traveling at a reasonable rate, to run off the macadam. Indeed, it is an everyday occurrence. If plaintiff is to prevail, she must hold that such an accident is in itself negligence, and this we cannot do, no matter what standard we might adopt measuring the duty to a guest."

The Virginia Court has thus said that allowing the car to ride on the shoulder is not even negligence, let alone gross negligence. The only way that the plaintiff can convert this act into an act of gross negligence is by evidence showing the reason for going off the shoulder. For instance, if he showed that the defendant intentionally ran off the road, he would have a case. Here, as in the Plybon case, attempting to get the car back on the road certainly is not negligence.

The best the plaintiff can do, is to ask the jury to infer

that the automobile was being driven at an excessive speed, and then further infer that the excessive speed caused it to leave the road. The inference of excessive speed must be drawn from the physical evidence, and this is not sufficient in Virginia to convict the driver of excess speeding. See *Richter* v. *Seawell*, 183 Va. 379, 32 SE 2d 62, here the Court said

> "it is a matter of common knowledge that if an automobile traveling at 55 mph, or less, gets out of control, it may behave in a manner which seemingly defies all laws of physics."

In this case our Court of Appeals reversed a judgment of the Trial Court entered for the plaintiff and entered final judgment for the defendant. The accident occurred on a roadway 42 feet wide that was straight and practically level. The physical facts showed that the car had gone off the pavement on the right hand side, traveled on the shoulder for 118 yards, came back on the pavement, and after skidding sideways to the left, proceeded diagonally along the pavement for 74 yards, again left the road to the left, down an enbankment and struck a tree 24 feet off the road. Our Court said:

> "while the physical facts we have just stated justified the inference that the car was proceeding at considerable speed, there is nothing to indicate that the speed itself was so great as to constitute gross negligence, or that it was the proximate cause of the accident * * *. evidently, for some reason the driver of the car lost control of it, but there is a total lack of evidence as to what caused this. The fact that it ran off the pavement on the right was probably, at least, a contributing factor, but the record is silent as to why this occurred. It may have been due to a number of reasons, anyone of which would have been consistent with the lack of gross negligence on the part of the driver. He may have been crowded off the road by another vehicle, or been blinded by the lights of

an oncoming car * * * again, a sudden illness of the driver, or a sudden break in the mechanism of the car, may have caused it to leave the highway * * * an inference cannot be drawn from a presumption, but must be founded upon some fact legally established *** it is true that gross negligence, as well as simple negligence, may be proven by circumstantial evidence *** but in order for the plaintiff to prevail, the circumstantial evidence relied on must show something more than that the injuries complained of may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which he is not."

Of primary interest is the fact that the Court held that there was no showing as to what negligence was the prxi-mate cause of the accident.

In the case of *Keen* v. *Harman,* 183 Va. 670, 33 SE 2d 197, a truck left the paved surface of the road on the right hand shoulder, continued thereon for 100 feet, crossed next for 90 feet diagonally over the roadway, left the road to the left, crossing a 6 foot shoulder, over a 15 inch ditch, up a shale bank 10 to 15 feet, and then to rest on its top with the wheels in the air 45 feet from the last mark on the bank of shale. In reversing the judgment for the plaintiff the Court said:

"the verdict of the jury was based on a mere guess or conjecture without sufficient credible evidence to support its finding. There is a scintilla of evidence tending to show that some time before the accident Stinson had taken a drink of whiskey, but the testimony is wholly insufficient to show that he was intoxicated or that his drinking was a contributing factor in the wreck of the truck."

Again, our Court held that where there might possibly have been sufficient evidence to show excess speed, and, in

this case, the possibility of showing intoxication, they could find no evidence on which to base the conclusion that either one of these inferrable acts of negligence were the proximate cause of the accident.

With regard to the "slow" sign prior to the scene of the accident the case of *Garst* v. *Obenchain*, 196 Va. 664, 85 SE 2d 207, the Court of Appeals of Virginia said that caution signs are not speed limitation signs and disregard of them is not an independent violation of traffic regulations apart from the duty to operate one's automobile at a speed reasonable under the circumstance. There is no evidence here of unreasonable speed, 51 feet of tire marks on a dirt shoulder certainly do not allow an inference of excess speed on a 25 foot open roadway with a 35 mile speed limit.

In all of these cases our Court of Appeals quotes from the case of *Chesapeake and Ohio Railway Company* v. *Heath*, 103 Va. 64, 48 SE 508, to the effect that the party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This Court has repeatedly held that when liability depends upon carelessness or fault of a person, or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred and some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess or random judgment, upon mere supposition without a single known fact.

We also have the late case of *Dishman* v. *Pitts,* 118 S.E. 2d 509 in which a judgment for the plaintiff was reversed and judgment entered for the defendant. The plaintiff in that case was a passenger in the defendant's car and there was direct evidence that the car, while traveling on a black-topped 22 foot roadway, which was straight and level, came on the wrong side of the road directly into the path of an oncoming truck. There was no evidence as to why the driver suddenly lost control of his car. The Court said:

> "it could have been due to any number of reasons. Agnew could have become suddenly ill; the automobile might have malfunctioned in some way; he could have struck an obstruction in the road; he may have been guilty of inadvertance; he may have been blinded by bright lights of the tractor-trailer; or he may have deliberately turned his vehicle to the left upon seeing the Long car pull into his lane of travel. * * * We hold that the plaintiff has not shown by a preponderance of the evidence that Agnew was operating his automobile in such utter disregard of prudence amounting to complete neglect of the safety of his guest, which was a proximate cause of the accident."

Again, there was no showing of proximate cause.

Our plaintiff here must then rely on the evidence of intoxication and ask that the jury infer that the defendant was so thoroughly intoxicated that he could not possibly operate an automobile, and then infer from this inference that this intoxication was what caused him to leave the roadway. We are asked, on this line of reasoning, to allow the jury to infer proximate cause from an act of negligence such as intoxication which it clearly cannot do with an act of negligence such as excess speed. Such a legal theory was advanced by the plaintiff in the case of

Brooks v. Hufham, 200 Va. 488, 160 SE 2d 631. There the plaintiff had produced no direct evidence as to how the accident occurred. The plaintiff was a passenger in an automobile who had recovered a judgment against the driver of the other automobile involved in the collision so he needed to show only negligence, not gross negligence. The driver of the other vehicle, a man named Pierce, was driving a Chevrolet and the plaintiff argued from the physical facts that the car Pierce was driving made a left hand turn across the path of the oncoming vehicle in which the plaintiff was a passenger. The plaintiff produced evidence to the effect that the defendant, Pierce, was intoxicated and though some of that evidence was held to be improperly admitted, the certified results of a Bogen's test, the Court did not send it back down for a new trial but entered judgment for the defendant on the grounds that the plaintiff had not produced sufficient evidence to show what caused the accident. To quote:

> "it is not amiss to say that had Pierce's intoxication been established, yet the vital fact that his negligence was a proximate cause of the collision would have lacked the necessary proof. Of course, the collision and how it occurred would still have been a matter of mere speculation and surmise."

This is an exceptionally clear statement, not subject to misinterpretation, but categorically setting forth the fact that the law of Virginia is to the effect that proof of intoxication must be accompanied by proof that that intoxication is the proximate cause of an accident before a plaintiff can recover. Such proof is wholly lacking here which entitles this defendant to a judgment in his favor notwithstanding the jury verdict.

As the lower court said in its majority opinion:

> "there is a complete void in the evidence as to Kissinger's conduct between 8:00 p.m. and the accident." (App. A5).

This is accurate, not only as to Kissinger but as to the defendant, and with such a void, we submit that it is clearly contrary to Virginia law to allow a recovery based on gross negligence.

CONCLUSION

Since the lower court's holding is in direct conflict with this Court's opinion; since there is vigorous dissention between the Circuits, and between Judges on each Circuit; and since the lower court's holding is plainly in error on a matter of Virginia law, a writ of certiorari should issue.

Respectfully submitted;

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SOBELOFF, Chief Judge:

The instant case and *Thomas* v. *Hogan,* F.2d (4th Cir. 1962), decided this day, have a common question: the admissibility of an entry in a hospital record showing the result of a Bogen's test for intoxication. Here the District Court ruled the evidence admissible. *Kissinger* v. *Frankhouser,* 194 F. Supp. 276 (E.D. Va. 1961) (opinion by Hoffman, Ch. J.).

About 1:15 a.m. on October 16, 1959, an automobile overturned on Princess Anne Road a short distance from the main gate of the Oceana Naval Air Station. When found only a few minutes later, the lights of the car were on, the radio was playing, and gasoline was still pouring from its tank. James Frankhouser, the owner and driver of the car, was lying nearby, unconscious and bleeding profusely from a deep scalp wound, and his passenger, Lee Kissinger, lay dead fifteen or twenty steps away.

At the place where this tragedy occurred, the twenty-five foot wide asphalt road is three or four inches higher than the soft shoulder. Other than the deceased and Frankhouser, who claims amnesia, there were no eyewitnesses to the accident. However, the physical facts indicate that the right wheels of the car had gone off the road onto the shoulder at a slightly banked, left-hand curve, and that the car began to skid as Frankhouser slammed on the brakes. Apparently, when the driver attempted to return the fast-moving car to the hard surface, the right front wheel gouged into the edge of the elevated road, causing the vehicle to flip over. It skipped some 110 feet before coming to rest with its wheels in the air.

Seeking damages for the death, Kissinger's widow, who is also the administratrix of his estate, and the ancillary

administrator representing the surviving children, instituted the present case against Frankhouser. Plaintiffs alleged that the defendant's drunkenness, his driving at an excessive rate of speed, and his gross negligence caused the accident.[1] The affirmative defense of contributory negligence was interposed, as well as a denial of primary negligence. These issues were submitted to the jury. The verdict was in favor of the plaintiffs and damages were assessed in the amount of $18,900.

When Frankhouser was taken to the Navy dispensary, Dr. S. B. Meyerson, who was on duty, observed that the man had "the odor of alcohol on his breath," and the doctor's deposition further states that he "suspected that [Frankhouser] was intoxicated." This doctor ordered a Bogen's test and sent Frankhouser to the United States Naval Hospital at Portsmouth, Virginia, for further treatment. Upon examination of the patient at that hospital, the attending physician, Dr. J. M. Marlowe, noted his observations on the "Clinical Record":

1. Laceration scalp and forehead,
2. Fracture left pubis,
3. Bladder damage,
4. No fracture right fibula, and
5. *Simple drunkenness.*

As ordered, the Bogan's test was performed at the Portsmouth hospital by Hospitalman Kent Gibson, and evaluated by Dr. R. P. Heldt. The test showed that Frankhouser's blood had 2.5 milligrams of alcohol per 100 c.c. and Dr. Heldt recorded his finding on a "Hematology

[1] It is conceded that Kissinger was a guest in the car, and was required to prove gross negligence in order to establish liability. See Code of Virginia § 8-646.1 (1950).

Report." Shortly thereafter Dr. Marlowe noted the test result on Frankhouser's Clinical Record.

Over defendant's objection, the hospital record, which included the Clinical Record and the Hematology Report, was admitted in evidence. Basing his opinion on these records, Ramon Morano, a toxicologist of ten years' experience, associated with the office of the Chief Medical Examiner of the City of Norfolk, testified at the trial that Frankhouser was intoxicated on the night of the accident and incapable of properly operating an automobile.

For the reasons stated in *Thomas* v. *Hogan, supra,* we think that the hospital record was properly admitted. The defendant's evidence fell short of showing that the Bogen's test was not properly done. The testimony of the hospitalman who performed the test was that he had considerable experience with the test and that he followed the usual procedure in running it. True, he took only ten to twenty minutes to perform the distillation operation, and toxicologist Morano testified that it took him thirty minutes to perform this step, but it appears that Morano uses 4 c.c. of blood in the distillation process, while the hospital procedure calls for the use of only 2 c.c. There was not the slightest suggestion at the trial that the hospital procedure outlined by the witness did not yield a reliable result. Dr. Heldt, who evaluated the test, was not present to testify and his competency was not challenged. Indeed, the testimony shows that he, like Hospitalman Gibson, had considerable experience with the Bogen's test procedure. The test was performed in the regular course of the hospital's business and recorded according to the regular routine of the institution, thus meeting the requirements of the shop-book statute. The attack on the entry showing the result of the test must fail.

It is to be noted that the defendant did not assert on this appeal, either in brief or oral argument, that the introduction of Marlowe's "Initial Impression" of "Simple Drunkenness," entered on Frankhouser's Clinical Record, was error. He addressed himself only to the entry showing the result of the Bogen's test. However, assuming that a question as to the attending physician's initial impression is raisable, we are of the opinion that the admission of this record entry was proper. When Frankhouser was brought to the hospital, he had a severe scalp laceration, and it was no doubt thought desirable to conduct a Bogen's test to determine whether the symptoms he exhibited were due to head injury or to intoxication. The outcome of the Bogen's test would help to determine the diagnosis and the type of treatment he should receive. The record entry of Dr. Marlowe's initial impression was admissible to show the reason for ordering the Bogen's test, and it supports Dr. Meyerson's suspicions at the dispensary which induced him to order the test.

Three questions of state law are raised by the defendant in his attack on the jury's verdict. He asserts that gross negligence and proximate cause have not been proved and that the deceased was contributorily negligent as a matter of law. Little need be said about gross negligence. The evidence shows that Frankhouser was driving while intoxicated, and the Virginia court has taken judicial notice of the fact, universally recognized, that an operator of an automobile may become incompetent and reckless from drinking. *Crowell* v. *Duncan,* 145 Va. 489, 134 S.E. 576, 581 (1926). The jury could in the circumstances reasonably find Frankhouser's reckless conduct "shocking," and its finding of gross negligence cannot be disturbed. See, e.g., *Dickerson* v. *Miller,* 196 Va. 659, 85 S.E. 2d 275 (1955).

Likewise, there is adequate support in the evidence for the jury's finding of proximate cause. From the testimony that Frankhouser's intoxication rendered him incapable of properly operating his automobile, reasonable men could conclude that this was the cause of the accident. Of course, it is common knowledge that automobiles sometimes run off the road onto the shoulder through no fault of the driver,[2] but, where it is shown that the driver was intoxicated, an inference may be drawn that this was the cause. The issue was properly referred to the jury for decision.

Finally, the defendant contends that the evidence shows Kissinger's contributory negligence as a matter of law in riding with his drunken driver. It is asserted that under the Virginia law, a guest may not recover if he knew or reasonably should have known that his driver had been drinking intoxicating liquor to an extent likely to affect the manner of his driving, and the guest voluntarily continued as a passenger after a reasonable opportunity to leave the automobile. The cases cited by the defendant so hold. See *Seaboard Air Line Ry.* v. *Terrell,* 149 Va. 344, 141 S.E. 231 (1928); *Yorke* v. *Maynard,* 173 Va. 183, 3 S.E. 2d 366 (1939); *Bates* v. *Thompson,* 200 Va. 501, 106 S.E. 2d 728 (1959). However, this proposition of law requires affirmance of, rather than reversal of, the judgment here. The defendant had the burden of proving contributory negligence, see, e.g., *Burks* v. *Webb,* 199 Va. 296, 99 S.E. 2d 629 (1957), and the evidence fails to establish, with sufficient certainty to remove the questions from the jury's province, that the driver's drunken condition was apparent to the deceased or that he had an opportunity to leave the car. There is a complete void in the evidence as to Kissinger's conduct between 8:00 p.m. and

[2] See *Richter* v. *Seawell,* 183 Va. 379, 32 S.E. 2d 62 (1944); *Boggs* v. *Plybon,* 157 Va. 30, 160 S.E. 77 (1931).

the accident. The defendant is not warranted in his insistence that the trial judge should have required the jury to speculate that Kissinger knew of his driver's condition and that he had ample opportunity to leave the car. In this respect, the present case parallels *Bates* v. *Thompson, supra,* where the conflicting inferences as to the passenger's awareness were held to be for the jury.

We find no error, and the judgment below will be

Affirmed.

ALBERT V. BRYAN, Circuit Judge, dissenting:

The Federal Shop Book rule in my understanding of it is now expanded by the Court far beyond its intendment. As the effect will be to deprive a party—in criminal as well as civil cases—of the right to confrontation by his accuser and the safeguards of cross-examination in other than routine matters, I feel compelled to state my reasons for not joining in the opinion.

Frankhouser and Kissinger were taken by ambulance to the dispensary at the Station. The doctor on duty there noted as to Frankhouser "the odor of alcohol on his breath", and "suspected that he was intoxicated". He testified further that Frankhouser though not unconscious was "in a semi-stuporous condition", and had sustained a blow on the top of his head. This doctor ordered the blood test, and for this purpose as well as for general attention, sent him to the United States Naval Hospital at Portsmouth, Virginia.

The crucial evidence in this case on the intoxication of Frankhouser was the Naval Hospital record. On the "Clinical Record Physical Examination" under date of October 16, 1959 (the day he was admitted) is the entry "alcohol odor to breath". Upon the same sheet under "Initial Impression" is written "simple drunkenness". This record is signed by a Dr. J. M. Marlowe. In the same record of that day in "Doctor's Progress Notes" is entered "Bogans 2.5 mgm at 0315. J. M. Marlowe". The "alcohol odor to breath" entry the District Court ruled to be inadequate in itself to prove intoxication.

Dr. Marlowe was not called as a witness. In fact he did not ask for, make or receive the Bogen test. Although it appeared in another part of the hospital record and may

have been seen by the jury, neither Court nor counsel noticed until *after* the trial that a Dr. Heldt had requested, received and evaluated the test. He did not testify. Only the hospitalman at the Naval Hospital who had extracted the blood and run the test testified to it. A toxicologist took the stand for the plaintiff and explained to the jury the mechanics and meaning of the Bogen method. He stated, "Well, obviously 2.5 is a marked degree of intoxication and there is no question that the person could not properly operate a motor vehicle".

Admission of the hospital record as well as the testimony of the hospitalman and the toxicologist was opposed by defendant Frankhouser. The ground of the objection was that the entries could not be received under the Federal Shop Book law, 28 U.S.C. 1732—the only basis urged for their admission—because they embodied an opinion, rather than reflecting a regular event in hospital routine.

Error, I think, was committed in the reception of the hospital record. The issue on which it was adduced could not be proved by the entries alone. The first—"simple drunkenness"—was, as the record declares, only a conditional finding. Both this and "Bogans 2.5 mgm" were expressions of opinion derived through professional judgment. The recordation was not simply of the habitual or commonplace incidents of a patient's hospital stay as the statute contemplates. Without the aid and exposition of the author—he was not a witness in the trial—these notations in my judgment were not provable.

I. As previously suggested, the notation of "simple drunkenness" was merely "Initial Impression". Obviously the physician did not accord it definitiveness: on its face it was but tentative. He intentionally indicated a reluctance to express himself categorically. An impression is

merely an immediate, and often only passing, idea. "Initial" in the circumstances is a primary, "first-blush" or first-glance thought—one at the outset. The vagueness of "simple" points up the wholly provisional nature of the conception. The examiner here registered an unsureness, and was frank about his uncertainty: It was a diagnosis which the diagnostician would not and could not vouch as a final opinion.

The doctor's wisdom is evident. Here was a patient suffering from severe trauma to the head. The examining physician at the Station dispensary had merely "suspected" intoxication. Marlowe too detected the odor of alcohol, but the patient's actual condition certainly could not be fairly appraised in the circumstances. "Symptoms which are characteristic of drunkenness may result also from many different causes (e.g. epilepsy, brain injury, diabetic or kidney disease) . . . ." 7 Encyclopaedia Brittanica 792 (1961 ed.) Apparently, the doctor was only noting a possibility, based on his immediate observations, to guide and expedite later diagnosis and treatment. He never confirmed it.

This evidence, I think, should not have gone to the jury, primarily because it was only an impression. A jury is not permitted to hear a diagnosis which the doctor will advance only tentatively; unless final, its probative value is nil. In re Buck's Dependents Case, 176 N.E.2d 396 (Supreme Judicial Court of Massachusetts, 1961); Lyons v. Chicago City Ry., 258 Ill. 75, 101 N.E. 211 (1913). Moreover, for the same reasons I note in a moment for believing the Bogen test entry inadmissible, I would also reject the "simple drunkenness" memorandum.

II. The Bogen's method of determination of the alcohol content of human blood is not a simple reading, such as

a temperature taking, which a literate layman can make. Two stages are involved: the running of the test and then its evaluation. The testimony provides a somewhat complete description of the process. The necessary apparatus consists of two vertical test tubes, side by side, "with inlet tubes to the bottom of each and outlet tubes to each side". In the first tube are placed 4 ccs. of the blood specimen together with what is known as a Scott-Wilson reagent (to eliminate "acetone bodies in case of diabetics"). A defoaming element is also included. In the next or second tube — the receiving tube -- are put 9 ccs. of Anstie's reagent, consisting of potassium dichromate and sulfuric acid. The tubes are then immersed in boiling water.

To the second tube is attached an aspirator, which is activated to reduce the pressure in the system. The alcohol in the blood in the first tube is volatized by the heat of the water bath, and passes over into the second tube containing the Anstie's reagent. The "boiling and aspirating" in the distilling process must continue for a half hour. As the alcohol distills over, it condenses into a green chemical-chromic sulphate. By comparison of its hue with results of tests of known alcoholic content through the use of a colorimeter, the amount of alcohol in the specimen is assessed by the evaluator.* Thus, the first stage calls for an expert execution of a prescribed technique and the second a professional appraisal of the results of the first. Instantly, the toxicologist called to evaluate the test report, as I read his testimony, completely destroyed the acceptability of that test. The use of 2 ccs. of blood by the technician for the test, as noted in the majority opinion, in-

* For a lucid, graphic and scholarly exposition of the entire process, see: Determination of Ethyl Alcohol in Blood, by Sidney Kaye, M.SC. and Harvey B. Haag, D.D., Journal of Forensic Medicine (October-December 1954) 373; and Emergency Toxicolgy (2d. ed. 1961) by Sidney Kaye, M.SC. Ph.D., of Richmond, Va.

stead of 4 does not excuse the care, knowledge and attention the run requires for reliability.

The aim and history of the Shop Book rule deny it; to my mind, the scope the majority gives it. Never was the statute intended of its own force alone to authenticate opinion. Never was it designed to enable mere opinion to stand by itself for what it speaks in judgment. Never could it qualify an entry to testify—untried by cross-examination—to a diagnosis or prognosis. Not even the expert himself who was responsible for the entry would have such testimonial stature and immunity. An expert ascertainment is not "any act, transaction, occurrence, or event" as the statute contemplates. These refer to bare happenings, e.g., the presence of the patient in the room, whether abed or ambulatory, if on or off a diet, in a cast or not, treatments received, medicines prescribed and administered, and similar matters of course, routinely and regularly recorded. The majority opinion combats the expressions of the Supreme Court in Palmer v. Hoffman, 318 U.S. 109, 113-115 (1943).

Intoxication is commonly known to be quite a debatable state. Juries have wrestled with it on instructions formulated only after difficulty by both court and counsel. To say that a hospital entry may be taken as a declaration of the patient's condition in this respect is to accord it an evidentiary position wholly unjustified, indeed, offensive to our system of search for truth. Moreover, the Bogen test is of so grave consequence and has such vast import both in civil litigation and criminal prosecutions that I think it should be treated only for what it actually is—an expert ascertainment and not a mere mechanical exercise. This is peculiarly true when the result is to be given effect extramurally, not simply retained for the general reference of the hospital's physicians who know how

much credence it should receive in the circumstances of its procurement and their use of it.

The gravity of the danger of admitting such hospital entries without the doctor's verifying testimony is starkly drawn by reference to its use in criminal cases. One could be convicted of a felony upon these entries alone, if guilt or innocence depended on sobriety or inebriety. Alarming and unthinkable there, it is little less so in a civil action of importance.

Slight consolation is provided the affected party by the statute's invitation to him to assail the record. The assault would be directed at the responsible doctor. But rarely would he be at the trial—the Shop Book authentication takes his place. In this the proponent is highly advantaged to the prejudice of his adversary, for he would neither have to produce the doctor, nor qualify him. Indeed, no qualification at all of any expert—medical or technical—would be required. The opponent would be deprived even of the right to inquire into the doctor's knowledge of what he had recorded, or the medical basis for his opinion. All this again but demonstrates the unfairness of the Shop Book entry as proof of an opinion. This inequity becomes the more manifest in the instant situation where the opinion is of an evanescent condition—it cannot be confirmed in any way. This alone would seem to destroy its "probability of trustworthiness"; the statute was not intended to "open wide the door to the avoidance of cross-examination." Palmer v. Hoffman, supra, 318 U.S. at 114.

New York Life Insurance Co. v. Taylor, 147 F.2d 297, 301 (D.C. Cir. 1945) firmly establishes the inadmissibility of an opinionative entry in a hospital record. Admittedly, the Court mentions in obiter the eligiblity under the sta-

tute of a notation in the record of a physician's observation of drunkenness. It is inapposite here because the instant entries are far more than observations: first a tentative finding and then a chemical analysis.

But admittedly there are decisions actually or apparently contra. See, for example, Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2 Cir. 1941). In most instances, however, upon scrutiny it will be seen that the hospital records received in evidence related only to factual matters, or the doctor was in court to corroborate them. This is why the District of Columbia decision in Wheeler v. United States, 211 F.2d 18, 22 (D.C Cir. 1954) cannot be said to overrule the view expressed in New York Life Insurance Co. v. Taylor, supra. In the later case the Shop Book statute was used merely to identify certain slides of smears as a genuine record of the latter. Other cases are inapplicable since they involved statements in his history made by the patient himself, doctors' recitals of what was *seen* on autopsy, birth dates and parentage, or observations of foreign substances found in the body.

Cited as contrary authority is our decision in United States v. Wescoat, 49 F.2d 193 (4 Cir. 1931). But the circumstances there were quite different. To begin with, the only objection raised was the cry of hearsay, and the right to admit an opinion under the Shop Book rule was nowhere involved. The evidence consisted of a soldier's field medical record fastened to his clothing. A diagnosis of "choroiditis" — an eye inflammation — was included. Foremost, however, in difference is that the record was signed successively by medical officers of the United States, the defendant, and was thus binding on the defendant.

True, this court has said that "The alcoholic content of the blood . . . is an objective fact, not a mere expression of opinion . . .". Kay v. United States, 255 F.2d 476, 481 (4 Cir. 1958). But there the reference was directed to a certificate of content which was by fiat of statute, now 1950 Code of Va. 18.1-55 et seq., made an evidential fact. This fact in turn gives rise to certain presumptions. The expert whose determination is acceptable is named by statute. His qualification is conclusively established thereby. But, paramount, the blood test can be made only at the request of the accused and with his implied consent that it may be used in evidence against him in a *criminal* prosecution.

I do not mean to say that hospital record entries of a preliminary diagnosis or result of a Bogen test are not pertinent to an inquiry upon intoxication. I do mean to say the entries do not by themselves prove their truth.

I would set aside the verdict and the judgment thereon and order a new trial for error in the admission of the hospital record entries.

Judge Boreman has authorized me to state that he joins in this dissent.

SOBELOFF, Chief Judge:

The principal question presented by this appeal is whether a hospital record containing an entry showing the result of a Bogen's test for intoxication is admissible as a business record under the federal shop-book rule. 28 U.S.C.A. § 1732.

In the late evening of January 24, 1959, Joseph E. Thomas, a sailor, sustained severe and permanent personal injuries when struck by an automobile as he was walking south across Bellinger Boulevard at the Naval Air Station in Norfolk, Virginia. As a result, Thomas' right leg had to be amputated, and, in the jury trial below, he was awarded damages in the sum of $40,000.00.

Bellinger Boulevard is a four-lane roadway over sixty feet wide at the point where the accident occurred. According to the plaintiff, he crossed the two west-bound lanes without incident, and when he reached the double center line of the boulevard he looked to his right (westerly) and saw the headlights of a car about 200 to 250 feet away, moving in his direction in the lane next to the center line. Thinking that he had ample time at least to cross the inside east-bound lane, he continued on. As he advanced one step into the outside lane, he looked up and saw the car about fifty feet away veering to the right and coming toward him. His testimony is: "I knew if I walked any further, that I would be right in front of the car. So I stopped. Then I figured, well, what if I take a step back, then I'll be out of the way, but I don't know if she was going to go this way or that way. I was kind of—so I just stood there, and at that moment I was hit."

Ruth A. Martin Hogan, the driver of the vehicle which struck the plaintiff, defended primarily on the ground that

the plaintiff was drunk and that his negligence was the cause of the accident. She related that she was driving east on Bellinger Boulevard in the lane next to the center line at a speed of 25 to 30 miles an hour. The night was dark, but at a distance of fifty feet she saw the plaintiff standing at the double center line which divides the road. She testified: "This man stood on the double white line, and I watched him to see what he was going to do, and it appeared that he was going to stand there and wait for me to pass, and I got within less than a car length from him, and I don't know whether he tripped or fell, but he lunged out in front of the car and I swerved to the right to try to avoid him."

At the nearby Navy dispensary to which the plaintiff was taken, Dr. Schwartz, the attending physician, found that Thomas' leg had been badly fractured, and that his "speech was slurred, his pupils were bilaterally dilated and reactive and he was uncooperative." The physician also detected the odor of alcohol on the plaintiff's breath, and since the symptoms were consistent with head injury as well as with intoxication, he ordered a Bogen's test to determine the amount of alcohol in the plaintiff's blood.

The Bogen's test is a relatively simple scientific procedure, commonly performed at the Navy dispensary, which involves the absorption of alcohol from a blood sample into a chemical solution which causes it to change color. By heating the blood sample in a sealed test tube, the alcohol in it passes in a gaseous state through a connecting tube into another test tube containing a receiving solution. The discolored receiving solution is then compared visually with a series of test tubes containing discolored solutions having predetermined blood-alcohol ratios.

Following the usual procedure of the Navy dispensary, a corpsman extracted a sample of blood from the plaintiff and conducted the distillation operation in the laboratory which is on the same premises. He then brought the test tube containing the discolored receiving solution to Dr. Schwartz who made the visual comparison. The test result showed that the plaintiff had three milligrams of alcohol per cubic centimeter of blood, indicating that he was quite drunk.

At trial, the defendant called Dr. Schwartz as a witness and sought to introduce through him the result of the Bogen's test. Alternatively, she tendered the hospital record containing an entry of the test result. The plaintiff objected to both tenders, and out of the presence of the jury the District Judge heard testimony as to the nature of the test, how it was conducted and its significance.

The Judge sustained the objection to the direct testimony of Dr. Schwartz on the ground that the doctor had not seen the corpsman actually perform the test and could not state from his personal knowledge that the discolored receiving solution returned to him by the corpsman was in fact the test result of the plaintiff's blood. Since the corpsman was unavailable to supply this evidence, the Judge concluded that the defendant had "failed to establish every necessary link in the chain of identification."[1] Also, the Judge noted that Dr. Schwartz was not familiar with the names of the chemicals used in the test procedure. Finally, alluding to the shop-book rule, the Judge declared that the statute made no provision for the admission of a record of facts otherwise inadmissible, and therefore

[1] Opinion of the District Court overruling defendant's motion for new trial, *Thomas* v. *Martin*, 202 F. Supp. 540, 543 (E.D. Va. 1961), citing *Novack* v. *District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947).

held that the hospital record entry of the Bogen's test result was likewise inadmissible.

The Judge ruled further that, while Dr. Schwartz could testify with respect to his objective observations of the plaintiff when he was brought into the dispensary, he would not be permitted to express an opinion as to whether the plaintiff was drunk. To each of these rulings the defendant duly excepted.

At the close of the evidence, the case was submitted to the jury under instructions on negligence, contributory negligence, last clear chance, sudden emergency and right of way. Upon the jury's verdict, judgment was entered for plaintiff Thomas and defendant Hogan prosecutes her appeal.

I

The federal shop-book statute, 28 U.S.C.A. §1732, provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrene, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section includes business, profession, occupation, and calling of every kind."

The section, enacted in 1936, provides an exception to the hearsay rule and is grounded on the premise that record entries made in the usual course of a business are likely to be an accurate reflection of the various daily transactions of the business.[2] To the extent that a record describes a usual routine operation of a business, it is considered trustworthy. But outside the area of such usual business routine, no presumption of verity attaches. *Palmer* v. *Hoffman*, 318 U.S. 109, 111-15 (1943). Consistently, hospital records have been held to be admissible under the statute,[3] for, as Dean McCormick explains, "The safeguards of trustworthiness * * * of the records of a modern hospital are at least as substantial as the guaranties of reliability of the records of business establishments." McCormick, Evidence 609 (1954).

On all this the parties agree. A divergence in view arises, however, as to whether a record entry of a diagnostic opinion by a doctor or the result of a scientific test which requires expertness to conduct or interpret is admissible under the shop-book rule. Entries of this type, the plaintiff insists, are not covered by the statute. Decisions which lend a measure of support to his argument have been found in the Court of Appeals for the District of

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[2] See McCormick, Evidence 597 (1954); 5 Wigmore, Evidence §§ 522-28 (3d ed. 1940).

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[3] See, e.g., the cases collected in Powell, Hospital Records in Evidence, 21 Md. L. Rev. 22 (1961); Note, Admissibility of Hospital Records in Evidence, 54 Yale L. J. 868 (1954); Hale, Hospital Records as Evidence, 14 S. Cal. L. Rev. 99 (1941); Annot., 120 A.L.R. 1124 (1939); Annot., 75 A.L.R. 378 (1931).

Columbia,[4] the Fifth[5], and the Sixth[6] Circuits and in some state courts.[7]

On the other hand, it is the defendant's position that records routinely made of diagnoses and scientific tests which are done in the regular course of a hospital's business, are entitled to admission under a presumption of trustworthiness. Supporting this argument, there are other

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[4] See *Polisnik* v. *United States*, 259 F.2d 951 (D.C. Cir. 1958) (recorded psychiatric diagnosis held properly excluded); *Lyles* v. *United States*, 254 F.2d 725 (D.C. Cir. 1957) (same as above); *New York Life Ins. Co.* v. *Taylor*, 147 F.2d 297 (D.C. Cir. 1945) (same as above). Apparently, however, this court is willing to admit recorded opinion if it is of a type on which doctors do not usually disagree. See *Washington Coca-Cola Bottling Works* v. *Tawney*, 233 F.2d 353 (D.C. Cir. 1956). See also, *Wheeler* v. *United States*, 211 F.2d 19, 22-23 (D.C. Cir. 1953).

[5] See *Mullican* v. *United States*, 252 F.2d 398, 404 (5th Cir. 1958) (diagnosis of patient's mental condition held properly excluded); *England* v. *United States*, 174 F.2d 466 (5th Cir. 1949) (opinion as to sanity based on hearsay held properly excluded). Apparently, the Fifth Circuit will permit introduction of hospital records only to show what treatment the patient received, the cost of services, and the like. See *Mo. Pacific R.R.* v. *Soileau*, 265 F.2d 90, 94 (5th Cir. 1959).

[6] See *Baltimore & O. R.R.* v. *O'Neill*, 211 F.2d 190 (6th Cir. 1954) (recorded statement as to what X-ray showed held not admissible), reversed on other ground, 348 U.S. 956 (1954). Apparently in this circuit, like the Fifth, the record is admissible only to show administrative matters. See *Ranger* v. *Equitable Life Assurance*, 196 F.2d 968, 972 (6th Cir. 1952).

[7] *West* v. *Fidelity-Baltimore Nat. Bank*, 219 Md. 258, 147 A.2d 859 (1959); *Baltimore & O. R.R.* v. *Zapf*, 192 Md. 403, 64 A.2d 139 (1949); *Peagler* v. *Atlantic Coast Line R.R.*, 234 S.C. 140, 107 S.E. 2d 15 (1959); *Travis Life Ins. Co.* v. *Rodriguez*, 326 S.W. 2d 256 (Tex. Civ. App. 1959), affirmed per curiam, 328 S.W. 2d 434 (Tex. 1959); *Hartman* v. *Harder*, 322 S.W. 2d 555 (Tex. Civ. App. 1959); *Liljeblom* v. *Dept. of Labor and Industries*, 57 Wash. 2d 136, 356 P.2d 307 (1960); *Keller* v. *Wonn*, 140 W.Va. 860, 87 S.E. 2d 453 (1955); *Cline* v. *Evans*, 127 W.Va. 113, 31 S.E. 2d 681 (1944).

cases in the District of Columbia,[8] and in the Second,[9] Third,[10] Seventh,[11] Eighth,[12] and Ninth[13] Circuits, and in state courts,[14] as well as three prior decisions of this

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[8] See *Wheeler* v. *United States*, 211 F.2d 19, 22-23 (D.C. Cir. 1953) (vaginal smear made in usual course of hospital's business held admissible, despite earlier decision excluding psychiatric diagnosis. See footnote 4, supra).

[9] See *White* v. *Zutell*, 263 F.2d 613 (2d Cir. 1959) (detailed report of a doctor's medical findings held admissible as a business record); *Terrasi* v. *South Atlantic Lines*, 226 F.2d 823 (2d Cir. 1955) (diagnosis of "fairly pronounced shock" held admissible); *Buckminister's Estate* v. *Comm'r*, 147 F.2d 331 (2d Cir. 1944) (diagnosis of cerebral hemorrhage held admissible); *Reed* v. *Order of United Commercial Travelers*, 123 F. 2d 252 (2d Cir. 1941) (diagnosis that patient "still apparently well under the influence of alcohol" held admissible). See also, *Travelers Ins. Co.* v. *Childs*, 272 F.2d 855 (2d Cir. 1959) (expressly withholding decision on whether diagnostic opinion is admissible).

[10] *Bartkoski* v. *Pittsburg & L.E. R.R.*, 172 F.2d 1007 (3d Cir. 1949) (hospital record showing condition of patient held admissible); *Norwood* v. *Great American Indemnity Co.*, 146 F.2d 797 (1944) (autopsy report admissible as a business record).

[11] See *United States* v. *Ware*, 247 F.2d 698 (7th Cir. 1957) (record of analysis by government chemist held admissible as a business record). See also, *Brucker* v. *Order of United Commercial Travelers*, 217 F.2d 876 (7th Cir. 1954).

[12] See *Glawe* v. *Rulon*, 284 F.2d 495 (8th Cir. 1960) (medical opinion held admissible); *Missouri-K-T R.R.* v. *Ridgway*, 191 F.2d 363 (8th Cir. 1951) (hospital record showing extent of injuries held admissible).

[13] See *Lew Moon Cheung* v. *Rogers*, 272 F. 2d 354 (9th Cir. 1959) (blood test admissible as business record); *Medina* v. *Erickson*, 226 F.2d 475, 482-83 (9th Cir. 1955) (diagnosis of "bronchogenic carcinoma" and "metastasis of the liver" held admissible).

[14] See *Bailey* v. *Tennessee Coal Iron and R.R.*, 261 Ala. 526, 75 So.2d 117 (1954); *Nichols* v. *McCoy*, 38 Cal. 2d 447, 240 P.2d 569 (1952); *D'Amato* v. *Johnston*, 140 Conn. 54, 97 A.2d 893 (1953); *Caccamo's Case*, 316 Mass. 358, 55 N.E. 2d 614) (1944); *Boutang* v. *Twin City Motor Bus Co.*, 248 Minn. 240, 80 N.W. 2d 30 (1956); *Allen* v. *St. Louis Public Service Co.*, 365 Mo. 677, 285 S.W. 2d 663 (1956); *Weis* v. *Weis*, 145 Ohio 416, 72 N.E. 2d 245 (1947); *Freeedman* v. *Mutual Life Ins. Co.*, 342 Pa. 404, 21 A.2d 81 (1941); *Conlon*

court.[15]

Primarily, the plaintiff's argument is grounded on two considerations. First, under the traditional rules of evidence, a witness must be shown to be qualified before he is permitted to give an expert opinion, and similarly, scientific tests must be qualified as reliable and properly executed before they will be received in evidence. Since direct evidence of this nature would not be admissible without laying the necessary foundation, the plaintiff argues that record entries containing information of this type should not be admitted unless the record also supplies the qualifying basis.

While we agree with the premise,[16] the suggested conclusion does not follow. We do not agree that the entry, to be admissible, must speak, not only of the diagnosis or the result of the test, but must also state affirmately the qualifications of the diagnostician or of the technician and the steps taken in running the test. We read the statute as supplying a presumption that diagnoses and scientific tests are properly made by qualified personnel, if the recorded information reflects usual routine of the hospital and if it is the practice to record such data contemporaneously or within a reasonable time. For example, a recorded diagnosis that a patient had pneumonia would be

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v. *John Hancock Mut. Life Ins. Co.*, 56 R.I. 88, 183 Atl. 850 (1936); *Joseph* v. *W. H. Groves Latter Day Saints Hospital*, 7 Utah 2d 39, 318 P.2d 330 (1957).

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[15] *Kay* v. *United States*, 255 F.2d 476 (4th Cir. 1958) (Bogen's test admissible under shop-book rule—alternative ground); *Long* v. *United States*, 59 F.2d 602 (4th Cir, 1932) (diagnostic statement of government doctor in government report held admissible as an exception to the hearsay rule; pre-Shop-Book Act case); *United States* v. *Wescoat*, 49 F.2d 193 (4th Cir. 1931) (same as above).

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[16] See McCormick, Evidence 377 (1954).

admissible, but a diagnosis of a rare disease might not, since it would not be one routinely made by the hospital personnel. Likewise, a record entry of a commonly performed blood test would be admissible, while an entry of the result of a scientific test infrequently done might not. When the two statutory requirements have been met, it makes no difference whether the record reflects an expression of medical opinion or an observation of objective fact. As said by Judge Parker in *Long* v. *United States,* 59 F.2d 602, 603 (4th Cir. 1932): "The diagnosis is the opinion of a scientific expert who has examined [a patient], heard his statements, and observed his symptoms. It approximates a statement of fact, being in reality what the physician observes when he views [a patient] with the trained eye of an expert."

There is good reason to treat a hospital record entry as trustworthy.[17] Human life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least, hospital records are deserving of a presumption of accuracy even more than other types of business entries.

Little need be said of the second consideration advanced by the plaintiff, that he would lose the right of cross-examination. Exceptions to the hearsay rule, permitting the introduction of reliable hearsay evidence, have existed almost as long as the rule itself, and they are deemed justified in the absence of cross-examination because the circumstances assure the probable verity of the evidence.[18]

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[17] Many courts have given the stamp of trustworthiness to hospital records. See, e.g., *Medina* v. *Erickson,* 226 F.2d 475, 482 (9th Cir. 1955); *Reed* v. *Order of United Commercial Travelers,* 123 F.2d 252 (2d Cir. 1941). And see, 6 Wigmore, Evidence § 1707 (3d ed. 1940).

[18] See McCormick, Evidence 455-79 (1954).

In the present case the testimony discloses that Bogen's tests were commonly done at the Navy dispensary. Equally clear is it that the test here was done in connection with the medical treatment of the plaintiff at the hospital. This was the hospital's business, and thus the record entry, routinely made, was admissible. The "missing link" in the chain of identification of the blood sample between the corpsman's taking the blood and Dr. Schwartz's determination of the test result is supplied by the presumption of regularity which attaches under the shop-book statute. This point was expressly ruled on by the courts in *Wheeler* v. *United States*, 211 F.2d 19, 22-23 (D.C. Cir. 1953), and *Lew Moon Cheung* v. *Rogers*, 272 F.2d 354, 360 (9th Cir. 1959). *Cf. United States* v. *Ware*, 247 F.2d 698 (7th Cir. 1957).

Concededly, the plaintiff may still attack the regularity of the test procedure and the competency of the corpsman who ran the test. He may point out that Dr. Schwartz did not see the test performed and was not entirely familiar with the chemicals used in the test. But these factors, the statute declares, "go to the weight of the evidence rather than to [its] initial admissibility * * *." *Kay* v. *United States*, 255 F.2d 476, 480 (4th Cir. 1958). Of course, a showing of unreliability may be so complete as to overcome the presumption of verity, and in such a case the trial judge should exclude the record. The evidence here falls far short of warranting exclusion. Indeed, there is not the slightest indication that the corpsman and Dr. Schwartz were not qualified to perform their respective tasks. We conclude that the District Court erred in excluding the record entry.

II

We next consider the ruling as to Dr. Schwartz's proffered oral testimony concerning the test result. It is

true that, under the traditional rules of evidence, and without the aid of the shop-book statute, oral testimony as to the result of a scientific testing procedure would not be admissible unless the procedure to which the testimony relates was shown to be reliable and to have been properly conducted.[19] Under the strict common law rule, Dr. Schwartz would be precluded from testifying as to the Bogen's test result since evidence would be lacking that the test had been properly done. However, so to hold under the facts of the present case would indeed be anomalous—the record entry would, as we have shown in Part I, be admissible, but not the same information tendered through the doctor who interpreted the test result and made the entry. Other courts have declined to permit such inconsistency.[20] Moreover, we do not see how the plaintiff is harmed. He will be able to cross-examine the doctor about the test, whereas one of his complaints about the admission of the record is that the opportunity for cross-examination is denied him. To the extent, then, that the doctor is made available for cross-examination, the plaintiff is benefited, and he has no reason to complain.

III

The plaintiff concedes that apparently all jurisdictions,[21] except Virginia,[22] permit even a lay witness to give an opinion as to whether a person was "drunk." Yet we are asked to say that a physician who examines a patient

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[19] See footnote 16, *supra*.

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[20] See, e.g., *Wheeler* v. *United States*, 211 F.2d 19, 22 (D.C. Cir. 1953). Compare *Watts* v. *State*, 223 Md. 268, 164 A.2d 334 (1960).

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[21] See 20 Am. Jur., Evidence § 876; 7 Wigmore, Evidence § 1974 (3d ed. 1940).

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[22] *Dickerson* v. *Town of Christiansburg*, 201 Va. 342, 111 S.E. 2d 292 (1959).

for treatment must be restricted to a bare recital of objective observations without being allowed to interpret these for the jury as truly indicative of intoxication. The contention cannot be upheld. Rule 43(a) of the Federal Rules of Civil Procedure provides that:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *."

This rule is applicable in diversity cases,[23] and prior to the adoption of the federal rules, even law courts of the United States had for a long time been receiving opinion testimony of this nature.[24] It was error, therefore, for the District Judge to exclude the doctor's opinion that the plaintiff was drunk, relying on the restrictive Virginia rule.

IV

These rulings cannot be considered harmless error.

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[23] See *Hambrice* v. *F. W. Woolworth Co.*, 290 F.2d 557, 559 (5th Cir. 1961); *Monarch Ins. Co.* v. *Spach*, 281 F.2d 401 (5th Cir. 1960); *Peoples Loan and Investment Co.* v. *Travelers Ins. Co.*, 151 F.2d 437, 440-41 (8th Cir. 1945); Joiner, Uniform Rules of Evidence for the Federal Courts, 20 F.R.D. 429 (1957). No contention is made that the restrictive rule of evidence applicable in Virginia courts must be applied by the federal court unde rthe rule of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Compare *Byrd* v. *Blue Ridge Rural Electric Corp.*, 356 U.S. 525, 535-40 (1958).

[24] See *Turner* v. *American Security & Trust Co.*, 213 U.S. 257, 260-62 (1909) (probate court); *Conn. Mutual Life Ins. Co.* v. *Lathrop*, 111 U.S. 612 (1884) (law court); *Ins. Co.* v. *Rodel*, 95 U.S. 232 (1877) (law court).

Particularly is this so with regard to the exclusion of Dr. Schwartz's opinion as to whether the plaintiff was drunk when brought to the hospital. True, there was ample other evidence indicating the plaintiff's intoxication. Indeed, he admitted drinking five beers on the night of the accident and had in his pocket a partly empty whiskey bottle; but, without the doctor's opinion, the plaintiff was in a position to argue that the symptoms he exhibited on admission to the hospital were due to his injuries and that he was not drunk. The defendant would have been in a stronger position to repel this argument if she had the benefit of the examining physician's opinion that the condition he observed in the plaintiff was due to intoxication and not a head injury.

V

Of the several other assignments of error, only one merits discussion.[25] The defendant argues that the plaintiff was contributorily negligent as a matter of law, even under his version of the facts, in failing to step back as the defendant's car approached him. With this we do not agree. The jury was properly instructed on the law of sudden emergency under the plaintiff's version of the facts, and it could properly conclude that the plaintiff did not act imprudently under the circumstances. The jury may have deemed it not unreasonable for the plaintiff to think that the defendant would swerve to the left and return to the inside lane, if she saw him in time. Aided by hindsight, we know that the plaintiff's choice to remain stationary was wrong, but under the exigencies of the sit-

[25] In the opinion of the District Court, overruling the defendant's motion for new trial, *Thomas* v. *Martin*, 202 F. Supp. 540, 542-43 (E.D. Va. 1961), the law of Virginia on the doctrine of last clear chance is correctly stated. Through inadvertence, the court's instruction to the jury on this issue varied somewhat from the legal principle there set forth, but we assume that this will not recur at the new trial.

uation, as portrayed by Thomas, we cannot say that he was negligent as a matter of law. It was a jury question, as the judge correctly held.

Reversed and remanded for new trial.

ALBERT V. BRYAN, Circuit Judge, dissenting in part:

For me the principal question tendered by this appeal is only in part the same application of the Federal Shop Book rule to hospital records as is approved in *Kissinger* v. *Frankhouser,* No. 8426 decided today. The doctor responsible for the entries in the instant case was present to read the test run and for cross-examination on his conclusions. The frailty of the defendant's proof was the failure of the evidence to establish that the specimen subjected to the Bogen's test and interpreted by the doctor was in truth the blood of the plaintiff.

With the District Judge, I think there was a fatal break in tracing the chain of identification. It does not appear that when the doctor made or directed the entry he could say unequivically it was the plaintiff's blood. Surely when neither the recorder of the entry—the doctor witness—nor anyone else vouches for the identity of the subject of the entry, the Shop Book statute does not supply the hiatus. The statute does not cause the record to say something the recorder could not say. The entry cannot rise above the knowledge of its author.

Here the evidential deficiency is an omission occurring *before or at the time* the entry was made. It is not that

the doctor at the trial, due to lapse of time, could not recall it was the plaintiff's blood and therefore had to depend on the hospital record. The gap in the proof does not simply go to the weight of the evidence; it cuts off entirely its relation to the case. Hence we do not reach the effect of the entry. But if I were required to pass upon the competency of the hospital record to prove by itself the accuracy of the run, I would hold the record inadmissible for the reasons I gave when dissenting in *Kissinger* v. *Frankhouser, supra.*

I concur in the judgment of reversal because I believe the District Judge was in error in not submitting the physician's opinion of the plaintiff's condition based on objective observations.

Judge Boreman has authorized me to state that he joins in this dissent.